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In The
Supreme Court of the United States
October Term, 1990

RONALD LEE FEE AND WIFE, NANCY LEE FEE, INDIVIDUALLY AND AS NEXT FRIENDS OF TRACY JOHN FEE, A MINOR,

Petitioners,

vs.

JOSEPH MILTON HERNDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The question presented is:

Did the Fifth Circuit err in departing from established Supreme Court precedent and the rulings of four other Courts of Appeals when it held that a mentally handicapped sixth grader beaten by his school principal cannot sue under 42 U.S.C. § 1983 for violation of his substantive due process rights because there were state remedies available?

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RONALD LEE FEE AND WIFE, NANCY LEE FEE, INDIVIDUALLY AND AS NEXT FRIENDS OF TRACY JOHN FEE, A MINOR,

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vs.

JOSEPH MILTON HERNDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Ronald and Nancy Fee, individually and as next friends for their son, Tracy Fee, respectfully pray that a writ of certiorari issue to review part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned proceeding on May 9, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals was issued on May 9, 1990. The opinion is reported at 900 F.2d 804 and is reprinted in the appendix at page 1a. The Court of Appeals issued its judgment as a mandate on May 31, 1990 (Appendix page 14a).

The District Court originally denied Respondent's motion for summary judgment (Appendix page 20a). However, Respondent filed a motion for reconsideration and the District Court reversed itself and granted summary judgment for the respondent (Appendix page 17a). Petitioners then filed their own motion to reconsider, which was denied (Appendix page 15a).

JURISDICTION

The decision of the Court of Appeals was entered on May 9, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . .

STATUTE INVOLVED

42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Summary of Arguments

The Supreme Court has specifically ruled that a § 1983 suit for violation of substantive due process rights may be brought even if state tort remedies are available. Four Courts of Appeals have applied this general rule in cases where school children

were injured by excessive physical discipline. Only the Fifth Circuit has held that the existence of a state remedy prevents a school child from bringing a § 1983 action. The Fifth Circuit's decision below defeats the chief purpose of § 1983 and denies school children in Texas, Louisiana and Mississippi the protection of § 1983 afforded their peers (and even suspected or convicted criminals) elsewhere in the United States.

Factual and Procedural Summary

On October 8, 1985, Tracy Fee was a twelve year old special education student in sixth grade. Tracy Fee was in a behavioral adjustment class at Dunbar Middle School in Dickinson, Texas. Tracy's teacher sent him to the principal's office for misbehaving. The principal, Joseph Herndon, told Tracy he was going to receive three swats, and Tracy refused to submit to the corporal punishment until his parents were called. A struggle ensued and, according to Tracy, Herndon hit him on his jaw with a fist. Tracy ended up on his back on the floor with his legs bent over him while Herndon sat on his legs and hit Tracy's buttocks, back and legs with the paddle many times. Herndon then grabbed Tracy by the neck and threw him back into his chair with enough force to make the child's head snap back and hit the wall.

That evening, Tracy's parents found bruises and abrasions all over their child's body, and he told them what had happened. The Fees called the sheriff's department and took their child to an emergency room. Tracy was admitted into a psychiatric hospital for mental problems caused by Herndon's beating. Tracy's parents incurred over $90,000 in medical bills.

Tracy's parents sued the principal, respondent Joseph Herndon, Tracy's teacher, the school district and its superintendent and board of trustees, alleging negligence and violation of Tracy's civil rights. The case was removed to federal court by the defendants.

The District Court originally denied Respondent's motion for summary judgment, stating that the summary judgment evidence suggested that Tracy Fee had suffered severe physical and psychological injuries and that the discipline was grossly disproportionate to the need. (Appendix pages 20a - 21a). However,

Respondent filed a motion for reconsideration, and summary judgment was granted by the District Court as to all defendants. (Appendix page 17a). The District Court dismissed the § 1983 claim against respondent because it found there was no evidence the corporal punishment was arbitrary, capricious or wholly unrelated to the goal of school discipline and because of Fifth Circuit precedent holding that the availability of state tort remedies precludes a § 1983 claim for due process violations. Petitioners then filed their own motion to reconsider, which was denied (Appendix page 15a).

The Fifth Circuit affirmed the District Court's decision and restated its holding in *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1343 (1989) that excessive corporal punishment cannot be a deprivation of the student's substantive due process rights if the state provides adequate civil or criminal remedies. (Appendix page 8a).

Petitioners seek to appeal only that portion of the Fifth Circuit decision denying Tracy Fee, and his parents individually and as Tracy's next friends, the right to sue Respondent, principal Herndon, under 42 U.S.C. § 1983.

REASONS FOR GRANTING WRIT

1. The Fifth Circuit's opinion is contrary to established Supreme Court precedent that the existence of a state tort remedy does not preclude a suit under § 1983 for violation of substantive due process rights.

This Court in *Zinermon v. Burch*, 494 U.S. ___, 110 S.Ct. 975 (1990) unequivocally held that, as to substantive due process rights, ". . . the constitutional violation actionable under § 1983 is complete when the action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 494 U.S. ___, 110 S.Ct. 982-983 (citations omitted).

The Fifth Circuit's opinion below, issued just three months after *Zinermon*, ignored this basic rule first set forth in *Monroe v. Pape*, 365 U.S. 167 (1961).[1] There, this Court stated:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[2]

Id. at 183.

This general principle was restated by this Court in another case decided in 1990, *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. ___, 110 S.Ct. 1384 (1990). In that case, which did not involve § 1983, this Court stated, "We likewise reject petitioner's contention that, where Congress authorizes a private right of action to vindicate a federal right we should assume that Congress has conditioned that right on the unavailability of a state remedy." *Id.*, at 494 U.S. ___, 110 S.Ct. 1389.

The Supreme Court has not yet applied this general precedent to cases involving school discipline. In *Ingraham v. Wright*, 430 U.S. 651 (1977), affirming 525 F.2d 909 (5th Cir. 1976) (en banc), the decision was limited to the procedural due process question and specifically avoided the substantive due process question. 430 U.S. at 678, n. 47. The Supreme Court held that the Eighth Amendment's ban against cruel and unusual punishment does not apply to corporal punishment in schools and that a spanked student may not sue under § 1983 for alleged *procedural* due process violations.

Significantly, the Supreme Court in *Ingraham* did hold that "corporal punishment in public schools implicates a constitutionally protected liberty interest." 430 U.S. at 672. This Court further stated:

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[1] overruled in part not relevant here, *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658, 664-689 (1978).

[2] Even the Fifth Circuit adheres to this basic principle in § 1983 cases not involving school children. In *Brantley v. Surles*, 718 F.2d 1354, 1358 (5th Cir. 1983), for example, the Fifth Circuit stated, ". . . the federal remedy under § 1983 is available regardless of the availability of an

> [W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.

430 U.S. at 674.

2. Four other Courts of Appeals have rejected the Fifth Circuit's denial of school students' rights to sue under § 1983.

Four Courts of Appeals have applied the Supreme Court's general principle, that the availability of state remedies does not preclude a § 1983 action, to cases involving excessive school discipline. The Court of Appeals for the Third, Fourth, Eighth and Tenth Circuits have ruled that students injured by the infliction of corporal punishment may bring substantive due process claims under § 1983 even where state remedies exist. *Metzger v. Osbeck,* 841 F.2d 518 (3rd Cir. 1988); *Wise v. Pea Ridge School District,* 855 F.2d 560, 564 (8th Cir. 1988); *Garcia v. Miera,* 817 F.2d 650 (10 Cir. 1987), cert. denied, 485 U.S. 959 (1988). The Fourth circuit in *Hall v. Tawney,* 621 F.2d 607 (4th Cir. 1981) specifically rejected the Fifth Circuit's line of cases followed in the opinion below.

The Fourth Circuit requires a spanked student to prove, ". . . the injury [was] so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir. 1981). In contrast, the Fifth Circuit ruled below that the due process clause is not implicated, *no matter how severe the injuries,* if there are state remedies available.

The Tenth Circuit in *Garcia v. Miera,* 817 F.2d 650 (10th Cir. 1987), cert. denied, 485 U.S. 959 (1988) analyzed the Supreme Court's opinion in *Ingraham* and held:

> Although *Ingraham* makes clear that ordinary corporal punishment violates no substantive due process rights of school children, by acknowledging that corporal punishment implicates a fundamental liberty interest protected by the Due Process Clause, we believe that opinion clearly signaled that, at some degree of excessiveness or cruelty, the meting out of corporal punishment violates the substantive due process rights of the pupil.

Id. at 654.

3. Why are criminal suspects and convicts able to sue under § 1983 when innocent school children are not?

A policeman who uses too much force in the course of an investigative stop could be sued by his victim in state court for negligence, gross negligence and assault and battery. Yet, the suspected criminal can sue the police officer under § 1983 for violating his civil rights. see e.g. *Graham v. Connor,* ___ U.S. ____, 109 S.Ct. 1865 (1989). Likewise, the black man who was verbally abused, arrested and handcuffed too tightly by a police officer in *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989) had state tort remedies available to him, but he was able to sue under § 1983.

What possible reason is there to allow suspected or convicted criminals access to federal courts under § 1983 when innocent school children are not, where both have state tort remedies available to them?

The Fourth Circuit answered this question when it stated that since substantive due process rights are," [c]learly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school children under the disciplinary control of public school teachers." *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir. 1981).

4. The purpose of § 1983 is defeated by a rule precluding § 1983 claims if there are state remedies available

The Fifth Circuit's opinion below would frustrate the purpose of § 1983. Congress' intent in enacting § 1983 was to allow individuals who have suffered deprivation of constitutional rights immediate access to federal courts notwithstanding any state law to the contrary. *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496 (1982). The Supreme Court in *McNeese v. Board of Education for Community Unit School District 187,* 373 U.S. 668, (1963) said that the purpose of § 1983 would be defeated if the courts held that the assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in state court.

The primary benefits of § 1983 are access to a federal, rather than a state, forum and a uniform, national body of law applicable to all civil rights suits. The Fifth Circuit is now denying those important benefits to school children injured by excessive discipline. The Fifth Circuit should be brought back in line with the rest of the nation before it widens this loophole in § 1983 and denies § 1983's protection to others with state remedies available to them.

CONCLUSION

The Supreme Court recently reaffirmed the established principle that the availability of state tort actions does not preclude a § 1983 suit for violation of substantive due process rights. Four Courts of Appeals have applied this general rule in cases where excessive physical discipline was inflicted on school children. Only in the Fifth Circuit does the existence of a state remedy stop a school child from bringing a § 1983 action.

If Tracy Fee were a convict beaten in a Texas prison he would clearly be able to sue his abuser under § 1983 even though state tort remedies were available to him. An innocent school child beaten like Tracy by his principal would be able to bring a § 1983 claim if he lived in New Mexico or Arkansas, but not if he lived just across the border in Texas. The public schools of states like West Virginia and Pennsylvania still function even

though their students can bring § 1983 actions against educators under shocking circumstances.

The purpose of corporal punishment is to promote a learning environment at school. The purpose of § 1983 is to protect all persons from the deprivation of their constitutional rights. It would be a sad lesson indeed for school children within the Fifth Circuit's domain if they alone are denied the protection of § 1983.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 7, 1990

APPENDIX

FEE v. HERNDON

Ronald Lee FEE and Wife, Nancy Lee Fee, Individually and as Next Friends of Tracy John Fee, a Minor, Plaintiffs-Appellants.

v.

Joseph Milton HERNDON, et al., Defendants-Appellees.

No. 89-2828.

United States Court of Appeals,
Fifth Circuit.

May 9, 1990

Parents of a special education student who allegedly received excessive corporal punishment by the school's principal brought a § 1983 action against the school district and various educators, including the special education teacher who allegedly failed to intervene in the corporal punishment. Pendent state-law tort claims were also attached to the suit. The United States District Court for the Southern District of Texas, Hugh Gibson, J., granted defendants' motion to dismiss for failure to state a claim, and parents appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) Texas law afforded adequate postpunishment civil and cirminal remedies, and (2) Texas law did not impose upon the teacher a duty to intervene in the corporal punishment.

Affirmed.

1. Civil Rights

A § 1983 complaint must state specific facts, not simply legal and constitutional conclusions. 42 U.S.C.A. § 1983.

2. Federal Courts

Standard of review to be applied in dismissal of federal or state claims for failure to state a claim is same as that exercised by trial court: it must appear to certainty that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Federal Courts

In reviewing dismissal of federal or state claims for failure to state a claim, Court of Appeals may not go outside pleadings and must accept all well-pleaded facts as true, viewing them most favorably to plaintiffs. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

4. Constitutional Law
Schools

Reasonable corporal punishment of student is not at odds with due process clause and does not constitute arbitrary state action. U.S.C.A. Const.Amend. 14.

5. Constitutional Law

Injuries sustained incidentally to corporal punishment, irrespective of severity of these injuries or sensitivity of student, do not implicate due process clause if forum state affords adequate postpunishment civil or criminal remedies for student to vindicate legal transgressions. U.S.C.A. Const. Amend. 14.

6. Constitutional Law
Schools

Where special education student allegedly received excessive corporal punishment, but state remedies—both criminal and civil—were available in Texas and proscribed excessive use of corporal punishment against students, substantive component of due process clause was not implicated. U.S.C.A. Const.Amend. 14.

7. Schools

Texas law did not impose upon teacher duty to intervene in allegedly excessive corporal punishment administered by feloow educator. V.T.C.A., Education Code § 21.912(b).

Appeal from the United States District Court for the Southern District of Texas.

Before KING, GARWOOD, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

A sixth grade special-education student became disruptive during classroom instruction, prompting the use of corporal punishment by the school's principal to restore discipline. The parents, Ronald and Nancy Fee, maintain that the principal beat their emotionally disturbed child so excessively, however, that the student was forced to remain in psychiatric rehabilitation for months. The parents further allege that they incurred large medical costs as a consequence of the hospitalization.

The plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 against the school district and various educators, averring that the fourteenth amendment's substantive due process guarantee operates to ban excessive corporal punishment in public schools. Pendent state-law tort claims were attached to this civil rights suit to raise charges of negligence and excessive force. Indisputably, however, state remedies—both criminal and civil—are available in Texas and proscribe the excessive use of corporal punishment against students, including emotionally handicapped children. That being so, our precedents instruct that the substantive component of the due process clause, though selectively applied in other contexts, is inoperative under facts herein presented.

We adhere to this circuit's rule that no arbitrary state action exists, by definition, where states affirmatively impose reasonable limitations upon corporal punishment and provide adequate criminal or civil remedies for departures from such laws. Accordingly, we conclude that defendants here, all of whom allegedly acted in contravention of Texas's criminal or civil laws, have not implicated federal substantive due process considerations, irrespective of the argued capriciousness of the corporal punishment imposed. Thus, federal constitutional relief is not among the plaintiffs' available remedies, and consequently we affirm.

I.

Tracy Fee attended special-education classes within the defendant Dickinson Independent School District. The few relevant facts not disputed by the litigants can be reduced

succinctly to the following: (1) Tracy attended sixth grade at a public school within the district; (2) he had a documented history of aggressive behavioral problems; (3) he attended special classes for emotionally handicapped children; and (4) he received corporal punishment from the school's principal after his teacher sent him to the principal's office for misbehaving in class. Excluding this narrow area of accord, the facts are dramatically at odds.

School officials downplay the extent of the student's injuries and focus upon his behavioral problems. The Fees, in contrast, portray a brutal beating of their son by the principal, Joseph Herndon, which was witnessed passively by his teacher, Suzanne Lahr. School officials admit that the principal paddled Tracy three times on the buttocks to serve as punishment for his disruptive behavior during a history class, but they insist that the punishment comported with official school policy, which provides for *reasonable* corporal punishment.[1]

The defendants further profess that the use of corporal punishment by school officials was agreed to expressly by the mother through a special-education consent form.[2] Any aggravated mental or physical injury, they maintain, was self-inflicted by Tracy, as he aggressively resisted punishment and thrashed about on the principal's floor. They also reject the assertion that Tracy's teacher, who accompanied her student to the principal's office, witnessed any use of excessive force against Tracy.

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[1] The official policy in effect at Dickinson's Dunbar Middle School provides, "Reasonable corporal punishment is permitted in order to preserve an effective educational environment, free from disruption." This general mandate is elaborated upon later in this same policy statement:

> Corporal punishment shall be reasonable and moderate and may not be administered maliciously or for the purpose of revenge. Such factors as the size, age, and condition of the student, the type of instrument to be used, the amount of force to be used, and the part of the body to be struck shall be considered before administering any corporal punishment.

[2] About three weeks prior to this paddling incident, Nancy Fee signed a special-education authorization form providing, among other things, that school officials could administer three paddle swats to Tracy for misbehavior.

The Fees allege that Tracy's injuries first became evident to them shortly after his return from school, where he complained of pain and having been beaten by the principal. They called the sheriff's department, and a police officer took pictures of the welts and scrapes on the child's body. The sheriff's department thereafter investigated the incident, but no criminal action was instituted against any defendant.

The parents assert that their son was hospitalized as a consequence of the beating and forced to spend a total of six months in a psychiatric ward; the total cost of this medical care approached $90,000. Further, Tracy has never fully recovered, we are told, as he has displayed even more pronounced antisocial behavior since the "brutal" beating. The parents admit, however, that Tracy's emotional problems predated this paddling incident.

The Fees filed a section 1983 action against Tracy's principal and teacher, the school district, and Dickinson's superintendent and trustees. The natural persons were sued in their official and individual capacities. Suit was originally commenced in state court and subsequently was removed. The complaint raises allegations of negligence, gross negligence, and excessive force with respect to the principal and teacher. Additionally, all defendants are charged with violating the student's substantive due process rights under the fourteenth amendment.

The defendants unsuccessfully moved for summary judgment at an earlier phase of this litigation. However, the district court warned the plaintiffs at that time that section 1983 does not provide for what the state-court petition terms "responded superior" [sic] liability for the negligent acts of educators. Accordingly, the court granted the Fees an opportunity to amend the complaint so that they could present their "best case." The Fees amended their complaint but not to the district court's satisfaction: The court held that the plaintiffs' "conclusory allegations" once again failed to premise liability upon grounds other that *respondeat superior*.

The defendants renewed their motion for summary judgment, which the district court construed alternatively as a Fed.R. Civ.P. 12(b)(6) motion to dismiss for failure to state a claim. The court disposed of all claims, except the state-law excessive-force charge

directed at the principal only. It thereafter declined to exercise pendent jurisdiction over this residual tort dispute and remanded that sole remaining claim.

The Fees appeal, maintaining, first, that the district court should not have dismissed the state-law action against the teacher who passively witnessed the corporal punishment. They also argue that the substantive component of the due process clause proscribes the abusive treatment of students, especially emotionally handicapped students, in public schools and thus affords to them a federal constitutional cause of action here.

II.

A.

[1-3] A section 1983 complaint must state specific facts, not simply legal and constitutional conclusions. *Angel v. City of Fairfield*, 793 F.2d 737, 739 (5th Cir. 1986); *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir.1985). The standard of review to be applied to a dismissal of federal or state claims pursuant to rule 12(b)(6) is the same as that exercised by the trial court: It must appear to a certainty that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1339 (5th Cir.1989); *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989); *Angel*, 793 F.2d at 739. We may not go outside the pleadings and must accept all well-pleaded facts as true, viewing them most favorably to the plaintiffs. *Patridge v. Two Unknown Officers*, 791 F.2d 1182, 1185-86 (5th Cir.1986); *O'Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir.1985).

B.

"Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children." *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir.1976) (en banc), *aff'd*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). This common law principle, in fact, predates the American Revolution. *Id.*, 430 U.S. at 661, 97 S.Ct. at 1407. However, coincidently with the genesis of corporal punishment, reasonable limits traditionally have been imposed upon student discipline

so as not to give teachers a license to commit state-sanctioned child abuse. Specifically, post-punishment civil or criminal remedies have targeted public school teachers who departed from the disciplinary norms defined by statute or the common law. *See* Comment, *Corporal Punishment in the Public Schools: The Effect of the Eighth and Fourteenth Amendments*, 29 Baylor L.Rev. 549, 556 n. 61 (1977) (citing nineteenth-century criminal convictions in Texas of educators who abused the use of corporal punishment).

This dispute presents the question of whether the federal Constitution independently shields public school students from excessive discipline, irrespective of state-law safeguards. In *Ingraham*, the Supreme Court declared that twenty swats to a student, which removed him from school for days with bruises and disabled his arm for a week, did not violate *procedural* due process guarantees. 430 U.S. at 682, 97 S.Ct. at 1418. That is, while "corporal punishment in public schools implicates a constitutionally protected liberty interest, *id.* at 672, 97 S.Ct. at 1413, the state may impose sufficient post-punishment safeguards to satisfy procedural due process concerns, *id.* at 682, 97 S.Ct. at 1418. Unfortunately, the *Ingraham* Court declined to address whether teacher discipline can be so capricous as to violate the amorphous substantive due process guarantees inherent in the fourteenth amendment. *Id.* at 659 n. 12, 97 S.Ct. at 1406 n. 12.

[4] We have stated that corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard v. Los Fresnos Ind. School Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984). Thus, *reasonable* corporal punishment is not at odds with the fourteenth amendment and does not constitute arbitrary state action. Consistently with this caselaw, Texas has authorized educators to impose a *reasonable* measure of corporal punishment upon students when necessary to maintain school discipline,[3]

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[3] *See* Tex.Penal Code Ann. § 9.62 (Vernon 1974) (use of force, but not deadly force, justified in educator-student context); Tex. Educ. Code Ann. § 21.912(b) (Vernon 1987) (qualifed immunity for educators imposing corporal punishment upon students).

and the state affords students post-punishment criminal or civilremedies if teachers are unfaithful to this obligation.[4]

[5] Our precedents dictate that injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensivity of the student, do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions. The rationale for this rule, quite simply, is that such states have provided all the process constitutionally due. Specifically, states that affirmatively proscribe and remedy mistreatment of studens by educators do not, by definition, act "arbitrarily," a necessary predicate for substantive due process relief. That is to say, the Constitution is not a criminal or civil code to be invoked invariably for the crimes or torts of state educators who act in contravention of the very laws designed to thwart abusive disciplinarians.

In *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 1343, 103 L.Ed.2d 812 (1989), a six-year-old kindergarten student received a total of five paddle swats, causing severe bruising on her buttocks. The child missed six days of school, and her injuries were deemed to be abusive by social welfare workers and her doctor. We held that no deprivation of substantive due process had occurred, because Texas provides adequate state criminal and tort remedies for any excessive punishment that may have been imposed upon the student. *Id.* at 272. *Cunningham*, we conclude, is dispositive here.[5]

[6] In this case, the student's mother authorized the use of corporal punishment against Tracy to cure his disruptive

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[4] If the measure of force applied to a student becomes excessive, common law tort remedies are available for damages. *See Barr v. Bernhard*, 562 S.W.2d 844 (Tex.1978); *Hogenson v. Williams*, 542 S.W.2d 456 (TexCiv.App.—Texarkana 1976, no writ). Texas also proscribes excessive corporal punishment with its criminal code. *See* Tex.Penal Code Ann. §§ 22.01, 22.04 (Vernon 1989 & Supp. 1990) (injuries to children).

[5] *See also Woodard*, 732 F.2d 1243 (three spanks to student, despite instruction from parent to teachers *not* to administer corporal punishment, does not violate substantive due process).

classroom behavior.[6] The litigants agree that the principal and the teacher attempted to discipline the child for his in-class disruptions and that offical school policy tolerates only reasonable corporal punishment. Although the injuries are alleged to have been severe, the student's substantive due process guarantees have not been violated under the rationale of *Cunningham*, as Texas does not allow teachers to abuse students with impunity and provides civil and criminal relief against educators who breach statutory and common law standards of conduct. Although the sheriff's department investigated the charges raised, no criminal prosecution commenced here; however, the possibility of state-law civil relief remains.

This circuit has consistently avoided any inquiry into whether five, ten, or twenty swats invokes the fourteenth amendment:

> We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.

Ingraham, 525 F.2d at 917. Thus, we have avoided having student discipline, a matter of public policy, shaped by the individual predilections of federal jurists rather than by state lawmakers and local officials. We find no constitutional warrant to usurp classroom discipline where states, like Texas, have taken affirmative steps to protect their students from overzealous disciplinarians.

The plaintiffs claim, however, that the viability of a section 1983 suit should not depend upon the adequacy of state remedies available against educators and, secondly, they assert that prisoners within this circuit enjoy more constitutional protection

---

[6] We not, however, that parental consent to corporal punishment is not constitutionally required. *Ingraham*, 430 U.S. at 662 n. 22, 97 S.Ct. at 1408 (citing *Baker v. Owen*, 423 U.S. 907, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975)).

than that afforded innocent school children. The Fees admonish this circuit for adhering to an "overly rigid" rule, one that allegedly does not contemplate egregious cases of student discipline, such as physical disfigurement or, as here, severe emotional injury. They underscore their displeasure with *Cunningham* and other precedent by suggesting that teachers could mutilate or torture students in the pursuit of discipline without federal constitutional relief.

We reject these emotionally charged criticisms as misplaced. The plaintiffs do not, and in fact cannot, claim that they lack adequate post-punishment remedies at the state level, under the facts as alleged in this case. The fact that they perceive federal damage recovery to be potentially more generous (Title 42 U.S.C. § 1988 authorized prevailing parties to secure attorneys' fees from constitutional violators.) is irrelevant to our inquiry and does not make state relief inadequate.

It is an overstatement to suggest that students can suffer extreme injury at the hands of educators without recourse. Admittedly, under *Cunningham* their choice of forum may be restricted to state courts. However, it is important to note that the *Cunningham* rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law. The inquiry, predictably, would differ in states that authorize neither.

The cases relied upon by the Fees to underscore our alleged inflated and inconsistent concern for prisoners are also distinguishable. These cases implicate constitutional provisions other than the fourteenth amendment, principally the fourth amendment's unreasonable-search-and-seizure provision or the eighth amendment's cruel-and-unusual-punishment clause. However, the *Ingraham* Court has expressly rejected the application of the eighth amendment to student punishment, 430 U.S. at 664, 97 S.Ct. at 1408-09, and the paddling of recalcitrant students does not constitute a fourth amendment search or seizure. None of these prisoner cases is premised upon the substantive protections afforded by the fourteenth amendment's due process clause.

The Fees' argument that their federal civil rights claim is independent in and of itself and should be decoupled from any state-law inquiry also misconstrues settled constitutional principles. Federal constitutional claims regularly turn upon state law: State law, for example, defines who shall be deemed a "final policymaker" for purposes of a section 1983 actions,[7] and it defines "property" worthy of compensation under the fifth amendment's taking clause.[8] Further, the doctrine of substantive due process focuses expressly upon the *arbitrariness of state action.* Thus, to dismiss the law of the forum state as irrelevant, as the Fees would have us do, is to misapply that doctrine.

We harbor no opinion as to the severity of the student's injuries in this case. We hold only that since Texas has civil and criminal laws in place to proscribe educators from abusing their charges, and further provides adequate post-punishment relief in favor of students, no substantive due process concerns are implicated because no arbitrary state action exists. Accordingly, we affirm the dismissal of the section 1983 claims asserted against all defendants.[9]

C.

[7] The Fees maintain that Lahr had a legal duty under state law to intervene in the paddling of their son and that her failure to do so constitutes actionable negligence. Curiously, they

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[7] *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 108 S.Ct. 915, 924-25, 99 L.Ed.2d 107 (1988)

[8] *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-19, 107 S.Ct. 1232, 1259-60, 94 L.Ed.2d 472 (1987) (Rehnquist, C.J., dissenting)("we have evaluated takings claims by reference to the units of property defined by state law"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court.").

[9] The Fees argue in the alternative that a strict application of *Cunningham* would not bar a § 1983 suit against the school district, supervisor, and trustees, since no post-punishment relief is available against them under state law. Assuming, without deciding, this to be true, the Fees still fail to state facts demonstrating that these government defendants fostered an official policy or custom to batter children, as required by § 1983.

rely upon Tex.Educ.Code Ann. § 21.912(b) (Duties and liability of professional employees) for the proposition that the district court erroneously dismissed the tort action against the teacher. Secion 21.912(b) states, however, that

> [n]o professional employee of any school district within this state shall be personally liable for any act incident to or within the scope of the duties of his position of employment, and which act involves the exercise of judgment or discretion on the part of the employee, *except in circumstances where professional employees use excessive force in the discipline of students or negligence resulting in bodily injury to students.* [Emphasis added.]

This statutory language defines the partial immunity enjoyed by Texas public school teachers; significantly, it does not create any duty on the part of teachers to intervene in the administration of corporal punishment by fellow educators. Further, no Texas court has yet crafted such a duty.

Nevertheless, the Fees maintain that the Texas Supreme Court has construed section 21.912(b) in such a fashion that a cause of action against the classroom teacher exists here. In *Barr v. Bernhard*, 562 S.W.2d 844[10] (Tex.1978), a student was injured on a school-sponsored farm when a calf dislodged a roof-support, leading to the partial collapse of the roof and the student's injuries. The plaintiffs in that case tried to pierce section 21.912(b)'s partial immunity by suggesting that the statute exempts *all negligence* resulting in bodily injury to students.

---

[10] No official state or school policy is offered, for example, to show that excessive punishment is permitted by teachers, nor do the plaintiffs state any facts to suggest that excessive punishment occurred within the school district as a matter of well-established custom. In fact, no other beating incidents are specifically pled or identified within the school district. Thus, no constitutionally proscribed conduct on the part of the higher-ranking officials has been demonstrated. Further, the district court properly concluded that the Fees cannot maintain *respondeat superior* liability, as argued here, against the district for the negligent acts, if any, committed by the principal. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978).

The *Barr* court rejected such a broad interpretation, holding instead that immunity under state law terminates in instances where a teacher *acts negligently in disciplining students* and as a result, causes bodily injury. *Id.* at 849; *accord Hopkins v. Spring Ind. School Dist.*, 736 S.W.2d 617, 618-19 (Tex.1987). In *Barr*, the students' injuries were not incurred as a consequence of discipline, and thus no tort recovery was available against school officials or the district.

Lahr does not contest the plaintiffs' interpretation of *Barr* and section 21.912(b); she does, however, object vigorously to the suggestion that such authority imposes a duty upon her to intervene in the corporal punishment administered by fellow educators. Lahr submits that her activities were limited to directing Tracy to the principal's office for misbehaving and recommending corporal punishment pursuant to the parental consent form.

It is undisputed that Lahr did not engage in the paddling of the student. Accordingly, her liability, if warranted at all, flows from a duty to intervene in the disciplinary activities of fellow educators if and when the punishment became "excessive." No such duty to intervene, however, exists under Texas law, and we decline the invitation to impose new duties under the state's tort law.

We conclude that the Fees have failed to state an actionable negligence claim against the teacher under existing Texas law; thus, only an excessive-force cause of action with respect to the school's principal remains. As all federal claims fail, and a single pendent state claim remains, the district court properly exercised its discretion when it remanded the residual tort action to state court. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357, 108 S.Ct. 614, 622, 98 L.Ed.2d 720 (1988) (where only pendent state claims remain, remand is discretionary). As the disctrict court noted, the plaintiffs are free to renew their theory of negligence in that forum. We express no view as to the merits of that claim.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 09 1990
GILBERT F. GANUCHEAU
CLERK

NO. 89-2828

RONALD LEE FEE and wife,
NANCY LEE FEE, Individually and
as Next Friends of TRACY JOHN FEE,
A Minor,
Plaintiff-Appellants,
versus
JOSEPH MILTON HERNDON,
ET AL.,
Defendants-Appellees.

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 4 1990
JESSE E. CLARK, CLERK

Appeal from the United States District Court for the
Southern District of Texas

Before KING, GARWOOD and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:
MAY 31 1990

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit
By SARAH L. HELNER
Deputy
New Orleans, Louisiana May 31 1990

May 9, 1990

RECEIVED
JUL 20 1989

UNITED STATES DISTRICT
SOUTHERN DISTRICT
ENTERED
JUL 18 1989
JESSE E. CLARK, CLERK
By Deputy: Edith Rogers

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RONALD LEE FEE,
ET AL

VS.

JOSEPH MILTON HERNDON,
ET AL

C.A. NO. G-87-374

ORDER

Before the Court is the plaintiffs' motion that the Court reconsider its final judgment of May 23, 1989, and that this case be reinstated. The plaintiffs asserts that it was improper for the Court to dismiss the 42 U.S.C. § 1983 action, as well as the pendent state action. In addition, the plaintiffs contend the case should be reinstated because a settlement was imminent until the Court dismissed the case. As for this last argument, it is farcical to argue that this Court should retain jurisdiction over a case merely because a settlement was imminent.

With regard to the state claim, the plaintiffs allege that the Court incorrectly misconstrued this particular cause of action. It seems that the Court made reference to an alleged violation of section 22.04 of the Texas Penal Code. The plaintiffs say the Court should have been reading section 21.912 of the Texas Education Code. The court has reread the plaintiffs first amended complaint and no where is there any reference to section 21.912 of the Texas Education Code. The only state statutory violation that the Court can find is on page three of the first amended complaint, and that statute is section 22.04 of the Texas Penal Code.

Yet, even if they plaintiffs were correct, and presuming that the section 1983 remained dismissed, the Court would still exercise its discretion to dismiss the state claim. If the plaintiffs feel strongly that they have a viable state cause of action, then they are free to pursue the matter in state court. As for the section 1983 claim, the plaintiffs make a one sentence statement that the case should be reinstated because a cause of action was stated under section 1983. The plaintiffs offer no reasons, no case law, no analysis. They merely make a conclusory statement. On this basis, the Court has no choice but to adhere to its May 1989 decision.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the motion to reinstate the case is DENIED.

DONE at Galveston, Texas this the 18th day of July 1989.

/s/ HUGH GIBSON
UNITED STATES DISTRICT JUDGE

/sm

EXHIBIT
NO. A

TRUE COPY 1
ATTEST:
JESSE E. CLARK, CLERK
By EDITH ROGERS
Deputy Clerk

UNITED STATES DISTRICT
SOUTHERN DISTRICT COURT
ENTERED
MAY 23 1989
JESSE E. CLARK, CLERK
By Deputy: N. Washburn

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RONALD LEE FEE,
ET AL

VS.

JOSEPH MILTON HERNDON,
ET AL

C.A. NO. G-87-374

ORDER

On March 2, 1989, the Court denied the defendants motion for summary judgment because the Fifth Circuit maintains a policy of allowing plaintiffs at least one opportunity to plead their best case in accordance with the heightened pleading requirements for meeting claims. See *Jacquez. v. Procunier,* 801 F.2d 789, 792 (5th Cir. 1986). In accordance with the Court's order, the plaintiffs filed an amended complaint. Defendants Herndon and Lahr now reurge their motion for summary judgment.

After reviewing the plaintiffs' first amended complaint, the Court concludes that the amended complaint lack the necessary factual specificity to state a claim upon which relief can be granted. In essence, the complaint sound in negligence, and mere negligence is not sufficient to establish a constitutional violation. *Davidson v. Cannon,* 474 U.S. 344, 346 (1986); *Daniels v. Williams,* 474 U.S. 327, 328 (1986).

With regard to the Board of Trustees, the plaintiffs generally aver that the Trustees are liable under the doctrine of respondeat superior. Unfortunately for the plaintiffs, the Supreme Court ruled eleven years ago that there is no respondeat superior liability

for a section 1983 claim. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978). In the alternative, the plaintiffs argue that the Trustees had a policy of authorizing corporal punishment on emotionally disturbed children. Even if true, the plaintiffs make no showing that corporal punishment was authorized to such an abusive extent that it would rise to the level of a substantive due process violation. In sum, there do not appear to be any facts that indicate that defendant Herndon's use of corporal punishment was arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. *Woodard v. Los Fresnos I.S.D.*, 732 F.2d 1243, 1246 (5th Cir. 1984).

The Court notes, however, that the plaintiffs' claim that defendant Herndon violated Section 22.04 of the Texas Penal Code. Accordingly, since the plaintiffs have an adequate postpunishment, procedural due process remedy to deter what they believe was unjustified or excessive punishment, the state courts will afford the plaintiffs all the process that is constitutionally required. *Woodard*, 732 F.2d at 1245.

It is, therefore, ORDERED, ADJUDGED, and DECREED that with the exception of the plaintiffs' claim against defendant Herndon for an alleged violation of section 22.04 of the Texas Penal Code, all other claims against all other defendants are DISMISSED.

It is further ORDERED that the Court declines to exercise its pendent jurisdiction over the state claim. The state claim against defendant Herndon is REMANDED to the 122nd District Court of Galveston County, Texas.

DONE at Galveston, Texas this the 23rd day of May 1989.

/s/ HUGH GIBSON
UNITED STATES DISTRICT JUDGE

/sm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 23 1989
JESSE E. CLARK, CLERK
By Deputy: N. Washburn

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RONALD LEE FEE,
ET AL

VS.

JOSEPH MILTON HERNDON,
ET AL

C.A. NO. G-87-374

FINAL JUDGMENT

In accordance with the Court's order of even date herewith, it is,

ORDERED, ADJUDGED, and DECREED that with the exception of the plaintiffs' claim against defendant Herndon for an alleged violation of section 22.04 of the Texas Penal Code, all other claims against all other defendants are DISMISSED.

It is further ORDERED that the plaintiffs' section 22.04 claim against defendant Herndon is REMANDED to the 122nd District Court of Galveston, Texas. All relief not expressly granted is DENIED.

This is a FINAL JUDGMENT.

DONE at Galveston, Texas this the 23rd day of May 1989.

/s/ HUGH GIBSON
UNITED STATES DISTRICT JUDGE

/sm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 2 1989

Jesse E. Clark, Clerk
By Deputy: N. Washburn

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GASVESTON DIVISION**

RONALD LEE FEE,
ET AL

VS.

JOSEPH MILTON HERNDON,
ET AL

C.A. NO. G-87-374

ORDER

Before the Court are two motions for summary judgment. The first motion was filed on behalf of all defe .dants, except Joseph Milton and Suzanne Lahr. The second motion was filed by defendants Milton and Lahr. The defendants argue that there is no cause of action for a due process violation arising out of the administration of corporal punishment by public school officials. The defendants are only partially correct. Where a Texas defendant inflicts corporal punishment, there is no claim upon which relief can be granted for allegations involving violations of a plaintiff s procedural due process rights, *Ingraham v. Wright*, 430 U.S. 651, 682 (1977), or a denial of equal protection. *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *petition for cert. filed* (Jan. 17, 1989).

Nevertheless, "[c]orporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. *Woodard v. Los Fresnos I.S.D.*, 732 F.2d 1243, 1246 (5th Cir. 1984). The scant summary judgment evidence suggests that the plaintiff sustained severe physical and psychological injuries, the discipline was grossly dispropor-

tionate to the need for action, and that the discipline may have been inspired by malice. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). If true, then such conduct is the sort of "inhumane and shocking abuse of official power" that warrant substantive due process protection.

Yet, not every defendant is necessarily liable for the substantive due process violation that has been alleged. There is no respondeat superior liability in a section 1983 claim. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978). Thus, conclusory allegations that the Board of Trustees are liable are not sufficient to survive a motion for summary judgment. This Circuit, however, maintains a policy of allowing plaintiffs at least one opportunity to plead their best case in accordance with the heightened pleading requirements required of section 1983 claims. *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986).

It is, therefore, ORDERED, ADJUDGED, and DECREED that the motion for summary judgment filed by defendants Milton and Lahr is DENIED.

It is further ORDERED that the motion for summary judgment filed by all other defendants, except defendants Milton and Lahr, is DENIED at this time. The plaintiffs shall file an amended complaint within ten days from the entry of this order. The amended complaint shall satisfy the heightened pleading requirements of *Elliott v. Perez*. 751 F.2d 1472 (5th Cir. 1985). Should the amended complaint not satisfy the *Elliott* standard, then the defendants may again move for summary judgment.

DONE at Galveston, Texas this the 2nd day of March, 1989.

HUGH GIBSON

UNITED STATES DISTRICT JUDGE

/sm

(2)

No. 90-249

Supreme Court, U.S.
FILED
SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

RONALD LEE FEE AND WIFE,
NANCY LEE FEE, INDIVIDUALLY
AND AS NEXT FRIENDS OF
TRACY JOHN FEE, A MINOR,

Petitioners,

vs.

JOSEPH MILTON HERNDON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether substantive due process is implicated in public school corporal punishment where the state provides civil and criminal remedies and adequate post-punishment relief, and therefore no arbitrary state action exists.

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No. 90-249

In The

Supreme Court of the United States

October Term, 1990

RONALD LEE FEE AND WIFE,
NANCY LEE FEE, INDIVIDUALLY
AND AS NEXT FRIENDS OF
TRACY JOHN FEE, A MINOR,

Petitioners,

vs.

JOSEPH MILTON HERNDON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The Respondent, Joseph Milton Herndon, respectfully requests this Court deny the Petition for Writ of Certiorari, seeking partial review of the Fifth Circuit's opinion.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 900 F.2d 804 and is reproduced in the Appendix to the Petition at pages la-13a. Citation will be to the Appendix.

JURISDICTION

The jurisdictional basis of this Court is adequately set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes and constitutional provisions at issue are sufficiently set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

In September, 1985, Tracy Fee was enrolled in Dunbar Middle School in Dickinson, Texas. He was placed in a behavioral adjustment class because he had a history of emotional and psychiatric problems. (Tr. 32, pp. 81-84).

On October 8, 1985, Tracy refused to obey his teacher, Suzanne Lahr. Tracy became upset in the classroom and struck his head on his desk top. After Tracy persisted in

ignoring his teacher and refused to respond to her questions, Ms. Lahr escorted Tracy to the office of the principal, Respondent Joseph Herndon. Ms. Lahr remained in the office to witness any disciplinary action.

Respondent advised Tracy he would receive three swats for misbehavior, a discipline option Tracy's parents had authorized. (Tr. 32, p. 104). Tracy threw himself on the floor and began kicking and squirming to avoid the spanking. Respondent held Tracy's legs down and managed to administer three swats on Tracy's buttocks. (Tr. 32, pp. 54-76). Tracy's teacher, Ms. Lahr, although present, did not observe any abuse or excessive force. (Tr. 32, pp. 54-59). Respondent later completed a report to the superintendent concerning the disciplinary action. (Record excerpts below, p. 69).

Ms. Lahr escorted Tracy to the school bus for his ride home. At home, Tracy began watching television and did not mention the spanking to his father. (Record excerpts below, p. 105). When Tracy's mother arrived home, Tracy told her of the spanking. Tracy's mother notified authorities, who took photographs of Tracy and noted bruises on his back, right arm, and right buttock. Tracy was taken to an emergency room where he was seen and released.

Petitioners sued Respondent, Ms. Lahr, the school district, its superintendent, and the board of trustees in state court. The case was removed to the United States District Court for the Southern District of Texas.

Respondent filed a motion for summary judgment. Consistent with Fifth Circuit doctrine, the District Court allowed Petitioners to amend their pleadings and state their "best case". (Appendix, p. 21a).

Respondent then moved for summary judgment on the amended complaint. The District Court concluded the amended complaint was factually insufficient and stated only a claim in negligence, which could not establish a constitutional violation. (Appendix, p. 17a). The Court also concluded the post-punishment remedy provided by Texas law afforded Petitioners all the process constitutionally required. The substantive due process claims were therefore dismissed.

Petitioners perfected an appeal to the Court of Appeals for the Fifth Circuit.

The Fifth Circuit affirmed dismissal of the substantive due process claims. The Court adhered to its rule that no arbitrary action exists where states impose limitations upon corporal punishment and provide adequate remedies for departures from those limitations. The Fifth Circuit held that states which affirmatively prescribe and remedy mistreatment of students do not act arbitrarily, a necessary predicate for substantive due process relief.

REASONS FOR DENYING THE WRIT

1. THE OPINION BELOW AND THE RECORD DO NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

Petitioners present this Court with a question based on incorrect assumptions. They erroneously assume the Fifth Circuit ruling below conflicts with rulings of four other circuits. Even so, they beg the question which should be before this Court: Was the ruling of the Fifth Circuit correct?

Petitioners attempt, by overstating the ruling below, to broaden it to the point of conflict with prior rulings of other circuit courts. The ruling of the Fifth Circuit below sets out clear parameters limiting the scope of its holding that *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1343 (1989), is dispositive of Petitioners' claims. In *Cunningham* the Fifth Circuit affirmed dismissal of due process claims where Texas had provided limits on the use of corporal punishment by statutes and common law. In the decision below, the Fifth Circuit focused on the applicability of *Cunningham*:

> [I]t is important to note that the *Cunningham* rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law.

Appendix, p. 10a. As to general substantive due process concerns, the Fifth Circuit reasserted its statement in *Woodard v. Los Fresnos I.S.D.* that corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning". 732 F.2d 1243, 1246 (5th Cir. 1984).

The decision of the Fifth Circuit, therefore, is limited to the particular context identified in *Cunningham*. By ignoring that limitation, Petitioners attribute to the court below an absolute rejection of substantive due process concerns. On the contrary, the Court found it unnecessary to address general due process issues, given the pleadings and facts of this case. (Appendix, p. 10a). Thus, this

case does not present an opportunity to review the substantive due process issue urged by Petitioners, and does not qualify for review by this Court.

For the same reasons, a decisional conflict with the Courts of Appeals for the Third, Fourth, Eighth and Tenth Circuits does not exist. Those courts have found that at some point, corporal punishment may violate substantive due process rights. The decision of the Fifth Circuit is not inconsistent, but is limited to the facts and the pleadings.

The ruling below does not contradict decisions of this Court, as Petitioners suggest. *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990), for example, does not bring into conflict the ruling below. In *Zinermon*, this Court granted certiorari to consider the proper scope of the *Parratt* rule. This Court held only that Burch had stated a claim under section 1983 for a violation of his procedural due process rights. Substantive due process was not at issue. Likewise, the Fifth Circuit's opinion below is not in opposition with *Adams Fruit Co., Inc. v. Barrett*, ___ U.S. ___, 110 S.Ct. 1384 (1990). *Barrett* involved a "reverse preemption" argument concerning an exclusivity provision of a state workers' compensation law, and a federal worker protection act.

This Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), affirming the *en banc* Fifth Circuit, did not address substantive due process. Rather, it refused certiorari as to whether "the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the due process clause of

the Fourteenth Amendment". *Id.* at 659, n.12. The opinion, therefore, cannot be the basis of any alleged decisional conflict meriting this Court's review.

Finally, the judgment below may be limited to the pleadings, as recognized by the District Court. After considering Respondent's motion for summary judgment, the Court ordered Petitioners to amend their complaint and "plead their best case in accordance with the heightened pleading requirements required (sic) of section 1983 claims". (Appendix, p. 21a). Following Respondent's reurging of his motion, the District Court concluded Petitioners' amended complaint still lacked the necessary factual specificity to state a claim and alleged only negligence, which was insufficient to establish a constitutional violation. *Davidson v. Cannon*, 474 U.S. 344, 346 (1986); *Daniels v. Williams*, 474 U.S. 327, 328 (1986). (Appendix, p. 17a). Petitioners have not alleged facts supporting a claim against Respondent under 42 U.S.C. § 1983. Petitioners' defective pleadings prevent granting them relief and, therefore, preclude review by this Court.

2. A SCHOOL OFFICIAL'S DEPARTURE FROM DISCIPLINARY NORMS DEFINED BY STATUTE OR COMMON LAW DOES NOT RISE TO THE LEVEL OF A SUBSTANTIVE DUE PROCESS VIOLATION.

The Fifth Circuit's decision below reaffirms its settled refusal to inquire into individual instances of school discipline. In *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court affirmed an *en banc* Fifth Circuit holding that procedural due process interests in corporal punishment were satisfied by traditional common law remedies. *Id.* at 673. This Court had denied certiorari to consider whether

severe corporal punishment was arbitrary, capricious, or unrelated to a legitimate educational purpose. *Id.* at 659, n.12. Not reviewed, therefore, was the Fifth Circuit's conclusion that it is

> a misuse of our judicial powers to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.
>
> *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc).

In addition to limiting its review to procedural due process and Eighth Amendment concerns, this Court declined the invitation to participate in policy decisions concerning school discipline.

> Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools". *Tinker v. Des Moines School District*, 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L. Ed. 2d 731 (1969).

Ingraham, 430 U.S. at 681-82. This Court found a historical and contemporary approval by states of reasonable corporal punishment, *id.* at 663, and thus considered a child's liberty interest subject to historical limitations. *Id.* at 675. In summary, this Court described the issue of

school discipline as "a legislative judgment, rooted in history, and reaffirmed in the laws of many States". *Id.* at 681.

The Fifth Circuit's decision below is consistent with the sensitivity of this Court to matters of public policy in school discipline. Specifically, the Fifth Circuit found "no constitutional warrant to usurp classroom discipline where states, like Texas, have taken affirmative steps to protect their students from overzealous disciplinarians". (Appendix at p. 9a).

This Court in *Ingraham* found the practice of corporal punishment in schools was recognized in the common law of most states. The Court described those state laws as a balance between a student's interest in personal security and the necessity of limited corporal punishment in education. This Court concluded "there can be no deprivation of *substantive rights* as long as disciplinary corporal punishment is within the limits of the common-law privilege". *Id.* at 676 (emphasis added).

The Fifth Circuit has held corporal punishment in concept is not arbitrary, capricious, or wholly unrelated to the legitimate purpose of determining educational policy. *Ingraham*, 525 F.2d 909, 916 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). The Fifth Circuit has also recognized the adequacy of Texas common law remedies and post-punishment relief for departures from reasonable use of corporal punishment. (Appendix, p. 7a-8a & nn.3-4). Given the existence of "civil and criminal laws to prescribe educators from abusing their charges," and "adequate post-punishment relief in favor of students," (Appendix at p. 11a), the Fifth Circuit correctly

held no substantive due process concerns are implicated by the discipline administered to Tracy Fee.

3. RESPONDENT WOULD BE ENTITLED TO QUALIFIED IMMUNITY IN ANY EVENT.

In his Answer, the Motion for Summary Judgment, and in the Court below, Respondent urged the defense of qualified immunity. The Fifth Circuit did not address the issue of Respondent's immunity from damages since Petitioners did not state a viable section 1983 claim. Had Petitioners stated a substantive due process claim, Respondent would have been entitled to immunity.

Respondent's qualified immunity would turn on the reasonableness of his actions in light of the legal rules clearly established in 1985. *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3038 (1987).

The law was not clearly established in 1985 that Respondent's act of punishing Tracy Fee would violate a substantive due process right. In fact, the clearly established law in the Fifth Circuit was to the contrary: Respondent's actions did not violate a due process right. *Woodard v. Los Fresnos I.S.D.*, 732 F.2d 1243 (5th Cir. 1984); *Coleman v. Franklin Parish School Board*, 702 F.2d 74 (5th Cir. 1983); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977).

This Court has held official action is protected by qualified immunity unless its unlawfulness is apparent in the light of preexisting law. *Anderson* at 3039. The preexisting legal rules in 1985 established that Respondent's acts were lawful. That being so, Respondent could not be

personally liable for those acts. A judgment below for Respondent is therefore consistent with the objective legal reasonableness of his conduct.

4. THE RIGHTS OF ARRESTEES, DETAINEES, AND PRISONERS ARE NOT AT ISSUE.

Petitioners' final argument for granting the writ involves the protections of the Eighth and Fourth Amendments of the Bill of Rights. *E.g., Graham v. Connor*, ___ U.S. ___, 109 S.Ct. 1865, 1871 (1989) (holding claim of excessive force during arrest should be analyzed under Fourth Amendment). The Fifth Circuit Court of Appeals correctly held the Petitioners' authority was distinguishable. None of the cases urged are premised on the substantive protections of the Fourteenth Amendment's due process clause. (Appendix, p. 10a).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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